

Craig Hospital and Linda J. Todd. Case 27-CA-11780

August 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On December 23, 1991, Administrative Law Judge Michael D. Stevenson issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed a response to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹In agreeing with the judge that the Respondent did not violate Sec. 8(a)(1) by discharging employee Linda J. Todd, we rely solely on the judge's finding that the Respondent had a substantial and legitimate business interest in maintaining the confidentiality of its in-house grievance procedure and his factual finding that Todd affirmatively agreed to keep the proceedings of the grievance committee confidential and that she intentionally violated that agreement.

Donald E. (Gene) Chavez, Esq. and Chet Blue Sky, Esq., for the General Counsel.
Kenneth R. Stettner and Kate Raabe, Esqs. (Stettner, Miller & Cohn), of Denver, Colorado, for the Respondent.
Linda J. Todd, pro se, of Morrison, Colorado.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Denver, Colorado, on October 3 and 4, 1991,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 27 on July 25, and which is based on a charge filed by Linda J. Todd (Todd or the Charging Party) on June 27. The complaint alleges that Craig Hospital (Respondent) has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act).

Issue

Whether Respondent discharged Todd because she engaged in concerted protected activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such con-

certed activities for the purpose of collective bargaining or other mutual aid or protection.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.²

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is a corporation operating a rehabilitative hospital in Englewood, Colorado, and further admits that annually, its gross volume of business exceeds \$250,000 and that annually, it purchases and receives goods, material and services valued in excess of \$50,000 which originated from points and places outside the State of Colorado. Accordingly, it admits, and I find, that it is a health care institution within the meaning of Section 2(14) of the Act and engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. *The Facts*

1. Preliminary statement

On January 22, after almost 11 years of employment, Ruby Gardner, RN, a statutory supervisor, was terminated by Respondent. Shortly after her termination, Gardner filed an in-house grievance protesting her discharge. Four persons were appointed to the grievance committee designated to investigate and to make findings on the grievance. One of these persons was Linda Todd, RN, who had worked for Respondent for almost 22 years. On February 22, Todd was terminated for certain activities committed while serving on Gardner's grievance committee. After Todd was terminated, a replacement was appointed to take her place on the grievance committee which for all intents and purposes began its work anew. To protest her termination, Todd then filed her own grievance which was heard by a different four-person committee. Ultimately both grievances were denied and both terminations were upheld (G.C. Exh. 5).

Gardner subsequently filed a complaint now pending before the U.S. Equal Employment Opportunity Commission, alleging both sex and racial discrimination. Although Gardner testified in the instant case, both sides agree that the merits of her discharge are not before me. Yet because Gardner's discharge is intertwined with that of Todd, certain background on both, as well as on the employer and its agents, is essential.

2. The employer

Respondent, a nonunion employer, operates a not-for-profit hospital specializing in the medical and rehabilitation treatment of traumatic spinal cord and brain injuries. Containing 60 beds, the hospital employs about 500 full- and part-time employees of whom 40 to 50 are registered nurses.

¹ All dates herein refer to 1991 unless otherwise indicated.

² Errors in the transcript have been noted and corrected.

Respondent's president is Dennis O'Malley who did not testify. Vice president is Michael Scott Manley, Ed.D., a lengthy witness at hearing. Called first by the General Counsel as an adverse witness and then by Respondent, Manley supervises the general operations of the hospital and is responsible to O'Malley. Prior to assuming his current duties in 1980, Manley had served Respondent for 10 years as director of counseling and psychology.

3. The grievance procedure

Respondent maintains an in-house grievance procedure which seeks to resolve employee complaints in an informal nonadversarial manner (G.C. Exhs. 2, 6). Where a dispute exists, an employee and his/her manager are first expected to attempt to resolve the matter. If unsuccessful, the employee and the department director must seek to resolve the matter. Thereafter, the employee puts the issue into writing including surrounding details such as expectations for relief, and gives the written grievance to the department director who must prepare a written response. If the matter is still not resolved, a four-person grievance committee is formed. Manley is always on the grievance committee and is always chairman unless the grievance is against him, or he otherwise excuses himself. The director of human resources is also usually a member. The other two members are appointed as follows: an employee named by the grievant, and a nonrelated department director selected by the chair. The grievant's representatives is expected to be sensitive, indeed sympathetic to the grievant's position, yet on the other hand cooperate with the other three members of the committee to reach a fair and equitable result. Nonemployees of the hospital play no role in the process and no legal counsel is permitted.

The committee is described as not legal or adversarial in nature; rather it seeks to collect and review relevant facts and information by interviewing witnesses, by examining documents, and by discussions among its members. When the committee finishes its work, it is empowered only to make recommendations to the grievant and to his/her department director. On one occasion in recent years, the committee voted 3 to 1 on its recommendation. In all other cases, the grievance committee reached a unanimous decision as to its findings. Thereafter, if the grievant remains dissatisfied, he/she has a right to appeal to O'Malley or to his designee, which is the final step in the process. Since 1985, there have been eight grievances, of which two were filed by an employee against Todd, and one was filed by an employee against Gardner. Four grievances, two from Gardner and two from Todd, reached the final stage involving appeals to O'Malley and in all four cases, the committee's recommendations were upheld.

4. Ruby Gardner

In May 1988, then Director of Nursing Jan Ferguson left Respondent's employ. According to Todd, Ferguson had been forced to resign for unspecific reasons, by O'Malley (Tr. 136, 190). After a selection process involving several different candidates to replace Ferguson, Carol Dannen, RN, M.S., was hired in February 1989. Apparently Ferguson, who did not testify, was liked by most employees of the nursing department, while Dannen, who did testify for Respondent, was disliked and feared by some members of the nursing de-

partment. Resistance to Dannen's changes in substance and style was led by Gardner.

Before her termination, Gardner had been the staffing nurse manager responsible for scheduling of all nursing department employees on a daily basis, including holidays and vacations. In addition, Gardner hired, fired, disciplined, and counseled the same employees. Before Dannen's hiring, Gardner had been supervised by a number of other persons; all found her performance satisfactory and in some cases exceptional. During 4 months under Dannen's supervision, between September 1990 to January, she was written up about six times by Dannen for various infractions.

On September 30, 1990, Gardner filed the first of two grievances against Dannen. Gardner requested Betty Vielhauer, RN, a nonsupervisor in urology, to be her representative on the grievance committee. According to Gardner, Vielhauer, who did not testify, was not permitted by other committee members to represent Gardner's interests. Accordingly, after losing this grievance, Gardner considered carefully who would best represent her on Gardner's second grievance committee formed in response to Gardner's grievance of January 24, protesting her January 22 termination by Dannen. The person Gardner chose was Linda Todd.

5. Linda Todd

In 1985, Todd had the first of two grievances filed against her. At this time, Todd was director of Respondent's department of education, with a staff of eight. A grievance committee was impaneled and ultimately upheld the grievance and ruled against Todd.

In 1986, for reasons that do not appear in the record, she was demoted from her job as a statutory supervisor to a non-supervisory position as nursing patient education specialist.

In 1986, after her demotion, Todd filed two grievances, one against the director of personnel, seeking her discharge and the other against O'Malley, seeking his removal as supervisor over department heads. For technical reason, neither of these two grievances was ever processed.

In January, Todd filed her third grievance challenging her 1986 demotion and the more recent decision of Dannen to exclude Todd from the regular nurse manager's meeting. The grievance committee decided 3 to 1 with Todd's representative dissenting, not to reinstate her position back to management.

Finally, after she was terminated, Todd filed her fourth grievance challenging her discharge. This time Manley did not serve on the grievance committee as he had terminated Todd. Todd failed to name a representative so O'Malley appointed three committee members and the chair, Ronald Branish, vice president for finance, apparently appointed the fourth member (R. Exh. 1). In pertinent part, the committee found with respect to Todd's discharge as follows:

The ultimate question to this grievance committee was whether or not the suspension and subsequent termination of Linda Todd was appropriate in light of the above circumstances and whether or not Linda should be reinstated to her former position of Nursing Patient Education Specialist. It is this committee's belief that the accusations made against Linda Todd by Scott Manley have been substantiated beyond any reasonable doubt to this committee and we believe that such viola-

tions of breach of confidentiality and an insubordinate, unprofessional and uncooperative behavior could be cause for a suspension and/or termination of an employee. Whether Scott Manley did or should have considered any extenuating circumstances in his ultimate decision of whether or not to terminate Linda is an issue that this committee did not address. We believe with the given facts uncovered in this fact-finding process that his ultimate decision to terminate her became an individual management choice; one which we believe he was authorized to make. [G.C. Exh. 9.]

6. Additional facts and circumstances

Prior to Dannen's employment, O'Malley distributed her resume and cover letter to certain employees in the nursing department including Gardner and Todd. Dannen's cover letter reads as follows:

My nursing administration experience may be of interest as you name a Director of Nursing Service.

I am bringing to a close a three year experience in a 175 bed regional referral center in a state of growth relative to technology and specialization. The enclosed resume highlights strategies directed toward ineffective first line managers, the need to downsize, a critical RN shortage, and the cultivation of a consumer-oriented mindset among employees.

I have a strong track record in the management of human and fiscal resources and have communicated effectively at all organizational levels. I am seeking an administrative position in a larger and geographically less isolated setting. I am able to relocate.

I would welcome the opportunity to learn of your organization's goals and objectives and to explore how I might contribute to their achievement. [G.C. Exh. 9.]

According to Todd, the alleged forcing out of Ferguson, and the ultimate hiring of Dannen alarmed some staff members of the nursing department and led them to develop a perception that O'Malley had hired Dannen as part of a scheme to reduce the nursing staff with emphasis on forcing out senior employees. Todd noted the second paragraph of Dannen's cover letter recited above as evidence of her future plans. Gradually as different senior employees left, Todd and Gardner came to believe that a "hit list" existed of those nursing employees targeted for removal, either through harassment or contrived charges.

On June 26, 1990, Todd met with O'Malley and told him that Dannen was out of control and was using two subordinate managers to devastate people. As a result, Todd was concerned about staff morale and about the persons allegedly being forced out. Todd mentioned the names of Dorothy Richardson and Bonnie Maki as examples of long-term employees who had been forced out by Dannen. On September 10, 1990, Todd again visited with O'Malley, beginning the conversation by saying, "Mr. O'Malley, I'm here to talk about Ruby Gardner." As Todd tried to explain to O'Malley that Gardner was afraid that Dannen was trying to get rid of her, O'Malley threw back his hands and said, "I don't want to hear it." When Todd persisted, O'Malley got up from his desk, hit the desk with his fist and said, "Linda, you know there's not a hit list." After O'Malley finally agreed to listen

to her, Todd purported to quote unnamed staff persons who believed a hit list existed; Todd added that the staff thought the administration was behind it, and that the staff was considering filing lawsuits or contacting a local media person in Denver to vocalize their complaints. Finally, O'Malley again denied all of Todd's charges and told her never to come to his office again with accusations, only if she had solutions.

On September 25, 1990, about a year and a half after Dannen's arrival in February 1989, Gardner hosted a meeting at her home attended by four employees including Todd, sympathetic to Gardner's pending grievance against Dannen. According to Gardner, the conversation expanded beyond Gardner's immediate problems to a discussion of the attendee's concerns generally of being separated from their jobs by Dannen. Todd discussed a counterstrategy of banding together to oppose Dannen with a united front, thereby creating a support group for each other. Persons in attendance included both supervisors and employees.

In early October, Gardner and Todd together with about four or five other employees and supervisors held a second meeting at lunchtime in Respondent's cafeteria. Similar discussions to those in the first meeting occurred.

Meanwhile Dannen was not unaware of the perceptions of some employees in the nursing department. On October 29, 1990, she held her own meeting at the hospital attended by about seven or eight persons including all or most of the persons who had been at the prior meetings organized by Gardner. There is some conflict in the accounts of Gardner and Dannen as to what the latter said. All agree that Dannen distributed handouts to the persons in attendance. They read as follows:

YOU CAN EXPECT. . .

1. YOUR NO. ONE PRIORITY

TO GIVE:

Your time

Your attention

Your best effort

TO *Your* job responsibilities

2. DIFFERENCES

You can expect that I will welcome differences of opinion during brainstorming and discussion phases.

You can expect that when discussion is closed and a decision is made, I will hold you accountable to lay your differences aside and give the effort your wholehearted support and cooperation.

3. NURSING AS A SELF-GOVERNED DISCIPLINE

You can expect that I will continue to act upon my authority and responsibility to organize and direct nursing service, and that I will be accountable to the CEO and governing board.

You can expect that I will address attempts to undermine me and I will hold you accountable to support nursing service authority and responsibility within the hospital organization.

4. MEETINGS

You can expect that the total group will routinely meet monthly.

You can expect that there will be smaller subgroup meetings and that you will not be a part of every meeting.

5. DIRECTION

You can expect that I will be continually assessing where we need to go and how we can get there.

You can expect that I will seek out those people who demonstrate:

- a. Understanding and support of ideas I have pursued to date.
- b. Attentiveness and creativity toward ideas; think about them; play with them; look at them from different angles; massage them into different shapes.
- c. Evidenced critical thinking and offer insightful and valuable input.

You can expect that you will have information about goals and objectives to the extent you need to know.

6. REORGANIZATION

You can expect that I will continue to decentralize decision-making to the floor managers.

You can expect that I will ask more of those roles that are "support" (rather than line); that you will function as a resource and support to the deliver of patient services.

You can expect that I will continue to assess and evaluate our nursing organization and will reorganize further as I identify opportunities to improve how we operate and function. [G.C. Exh. 8.]

According to Dannen, she asked the persons present to "lay down their swords" and to come together for the good of the hospital and its patients. Dannen also discussed the alleged attempts by some staff persons to undermine her by complaining about her to the Colorado Hospital Association, by contacting an attorney for legal advice, by filing unfounded grievances and complaints against her with O'Malley and by persuading a potential employee recruited by Dannen not to take the job.

Apparently the visits of Todd to O'Malley had been reported to Dannen, thus prompting her references to them without specifically naming Todd. When Dannen finished her remarks, she told the assembled employees to keep the contents of the handouts and their remarks confidential.

7. Todd's activities on the Gardner grievance committee

Prior to the first meeting of the grievance committee on February 11, Todd contacted four of Gardner's former supervisors and asked them to list four positive and four negative qualities they perceived for Gardner. Then Todd prepared a four-page document she titled, "10 Years/10 Months Ratio of Carol Dannen's 10 Month Retaliation Ending with 5 Termination Reasons to Ruby Gardner's 10 Year Job Performance Record" (G.C. Exh. 7). The document purported to demonstrate Dannen's bias and prejudice against Gardner

when compared to Gardner's treatment by her other former supervisors.

When Todd attempted to distribute the above-described document to other committee members, Manley and the others became concerned that Todd did not understand her proper role as a member of the committee. They explained to her that while she could function as Gardner's representative, she must do so in a nonadversarial way and keep an open mind.

After discussion, the committee adopted ground rules that only the committee would interview witnesses, that all discussions of the committee would remain confidential, and that Todd would have no contact with any potential witness, even with Gardner, without the knowledge or consent of the committee. Manley was designated to contact witnesses only for the purpose of scheduling, but was to have no substantive discussions with any person outside the presence of committee members. I find that Todd, like other committee members, understood and expressly agreed to these conditions. This was the testimony of Manley, of Dr. Whiteneck and the stipulated testimony of Kevin McVeigh.

On February 12, the grievance committee convened with all four members present. One witness called before the committee was Sue Briggs, who did not testify in the instant case. Todd began her questioning of Briggs by showing her copies of two written reprimands given to Gardner by Dannen (R. Exhs. 2, 3). On these documents, Todd had hand-written numerous annotations or comments apparently designed to further Gardner's case. Then Todd asked Briggs how she would feel, if she had been written up by Dannen. Todd attempted to ask additional leading questions which seemed to the committee to be statements of Todd's opinions, and again Manley and the other committee members objected. The witness was excused and a lengthy discussion ensued as to the proper form of questions which committee members were to ask witnesses.

When Briggs returned, questioning resumed. There is some insignificant dispute as to what was asked and by whom. Todd testified that she had been intimidated by other committee members into abandoning her prior line of questioning. I find only that if Todd abandoned her line of questioning, she did so for reasons other than a feeling of intimidation by the committee.

The next meeting of the grievance committee was scheduled for February 14. Before the committee convened, Todd drafted a letter to O'Malley, the final appeal authority for Gardner's grievance, with copies designated for other committee members and for certain employees, some of whom had been witnesses or were potential witnesses in the Gardner's grievance. After typing the letter, and preparing the requisite number of copies, Todd personally delivered the letters to the addresses or left copies with their secretaries or on their desks. The letter reads as follows:

Dear Denny:

I deeply feel the need to apologize to you and other members of the Craig Hospital community. I have lacked courage and wisdom to foresee all the things that have happened and are happening. Only as I have been privileged to serve as Ruby's representative, after Carol Dannen fired her, have they come to light.

I want to, first of all, say I am sorry that I allowed you to holler and pound on your desk and intimidate

me when I came to your office September 10, 1990 to make you aware that Carol Dannen was mistreating Ruby Gardner. I feel badly that I took no further action until now, as I serve as her representative on her second grievance.

I am now convinced that you hired Carol Dannen to get rid of nurses like Ruby, but I never realized until now the pain that you caused. As her representative I have thoroughly gone through her personnel file. She has ten years of service, and her record is impeccable until Carol Dannen began to intimidate, harass, and demoralize her. I have never been close to Ruby but her personnel record made me glow inside, because I have had the privilege of working with her for these years.

Denny, why all the cruelty? You know I went to the Colorado Nurses Association and talked with Jacqueline Harris. Remember I told you? At that time she told me that if a new Director of Nursing wants to terminate existing staff and hire her own there is no problem in doing so. But why beat down a beautiful person thoroughly trained in nursing and management skills until she begs you to let her stay as a staff nurse because of her love and loyalty to her hospital? You have denied her this. (See correspondence to Ruby Gardner from Dennis O'Malley dated January 28, 1991.) Forgive me, Denny, for being afraid of you and failing her. I now want to put my job, time, resources, and energy on the line and do all I can to correct the horrible injustice taking place in an institution in which we all hope to find love, care, and mercy.

Please, Denny, apologize for me to Scott Manley. I seem to lack the verbal skills to compete with him. Apologize for the lack of courage I showed by letting him call Betty Vielhauer into his office to check if she said, "I felt there were three against one . . . I felt there was no way to fight back . . . I felt like a rape victim." These are the statements I quoted to you in my letter dated February 11, 1991. And, then Scott did not have the decency to apologize to her. I will personally apologize to Scott today when Ruby's grievance committee meets and inform him that never again will I allow him to intimidate me. Kevin and Gale may be afraid of him as their supervisor, but I have grown tired of Scott's over verbalizing and will not again be intimidated. Are we not all peers in a grievance committee? Correct me if I am wrong.

I will apologize to Sue Briggs for letting the "boys" harass me, so that I stopped asking Sue relevant questions about Ruby's performance. After asking Sue to leave the grievance committee room, I was told, for 45 minutes, I could not question her. To my shame I must confess this.

Apologize for me also to Carol Dannen, for at least until now, I feared her as I saw Ruby cry in my office. I understand she cried in many offices including yours. Why couldn't anyone have shown her compassion?

I now view Carol as a despicable person. Before she was hired many of us fought with you to have her placed on the Board of Directors, only to have her write up Ruby 8 times in 10 months when Ruby had not been written up once in 10 previous years under 4 different supervisors.

Before Carol was hired I asked you during one of our meetings why she was leaving Alpena General Hospital, and you said, "She has won the battle but lost the war." I still don't know what this means. I only know that at Craig Hospital she is losing both the battle and also the war. Let me explain. On the one hand, she gives lip service to empower nurses. On the other hand she singles out a quality nurse like Ruby and destroys her professionally and personally. Imagine Ruby, a dignified human being, a highly skilled nurse, crying like a baby in our offices. Never again will I let a fellow nurse come to my office and cry out her pain and fear and not respond. Carol Dannen only quoted Ruby and did not hear or feel Ruby's pain when she quoted her in the fifth write-up dated November 6, 1990: "You don't want anyone with a brain. You assume the worst in people; you assume they come to work just to slide by. You just want people who you can control and manipulate."

Denny, thanks for hearing me on this, and in closing I am certain that before the grievance committee closes Scott will dictate to us that Ruby can't be reinstated as a staff nurse. But, please, reinstate her. Did you know that after Carol Dannen's first searing write-up dated March 29, 1990, Ruby wrote in her performance appraisal dated July 5, 1990:

"I remain as ever a faithful employee of the Nursing Department at this hospital.

Ruby H. Gardner RN"

Sincerely,

/s/ Linda Todd

Linda Todd, R.N.

cc: Chairman of the Craig Hospital Board of Directors

S. Manley
K. McVeigh
G. Whiteneck
C. Dannen
R. Pruett
S. Briggs
R. Gardner
B. Vielhauer

Nursing Management Team Members:

D. Reinhard
P. Allison
L. Schaetzle
P. Levinson
A. Herron
M. Armstrong

Personnel file of L. Todd

[G.C. Exh. 4.]

When Manley became aware of this letter, he asked Whiteneck to give his written reaction to it. It suffices to say that Whiteneck disapproved of Todd's letter saying in his opening paragraph,

This morning, I received a copy of a letter from Linda Todd to Dennis O'Malley dated February 14, 1991. This letter raises several questions in my mind with regard to Linda's comments about the grievance process,

the confidentiality of the present grievance procedure involving Ruby Gardner and Carol Dannen, and the potential impact on that grievance process. [R. Exh. 5.]

Shortly after receiving the letter, Manley met with Todd and said he was suspending her for 10 days pending further investigation for breach of ground rules regarding confidentiality.

On February 22, Todd met with Manley and McVeigh who discussed with Todd her prior actions on the committee as summarized above. Manley then asked Todd if she had anything to say. Todd replied, "I don't agree with you." Then Manley told Todd she was terminated. Later that day Manley sent Todd a letter which reads as follows:

Dear Linda:

Re: Meeting on February 22, 1991

As indicated to you in our meeting today, I am providing you with a summary of the meeting. At the beginning of the meeting, I explained the purpose of the meeting was to review the process I utilized in gathering information and reviewing documentation related to your suspension on February 14, 1991.

At the time I met with you on February 14, I indicated I was suspending you for a period up to 10 working days due to distribution of confidential information related to Ruby Gardner's grievance. Specifically, I'm referring to the letter you wrote to Denny O'Malley and distributed to staff members who were not directly involved in Ruby Gardner's grievance.

To assist in my review process, I examined information I distributed to the grievance committee: notes that I prepared as chairperson explaining the purpose and process of the grievance committee and written documentation which you provided to the committee and others. Additionally, after receiving my copy of the letter you sent to Denny O'Malley, I asked Kevin McVeigh and Gale Whiteneck to comment on your letter in terms of the conduct of the grievance process and the impact, if any, of the content and distribution of your letter in terms of continuing with the grievance process.

As you aware, the committee discussed at length the need for the information examined in the grievance committee to remain confidential. Information was not to be discussed or shared with any other individuals until the committee agreed upon what information should be shared and had the opportunity at the conclusion of the process to formulate specific recommendations.

At the first committee meeting on February 11, 1991, you advised the committee that you had already contacted four previous supervisors of Ruby Gardner for the purpose of exploring with them their impressions of her as an employee. The committee discussed this issue at length and agreed it was inappropriate for any individual committee member to contact another individual or employee without the consent of the committee. The only exception to this process was the committee's authorization for me to advise the employees the committee identified to be interviewed that the committee wanted to meet with them to review relevant

information related to the grievance process. I was also asked to contact Carol Dannen and Ruby Gardner to inform them of individuals who would be interviewed by the committee and when the committee would be desirous of meeting with them. Everyone on the committee including yourself agreed to this process.

The committee next reviewed the purpose and process of the grievance committee. A lengthy discussion took place on the importance of maintaining confidentiality throughout the process. The committee agreed that we were free to talk among ourselves, but members of the committee would not share information from the grievance process with anyone else unless so authorized by the committee.

At that point, you indicated a concern that you wanted to be able to talk with Ruby Gardner throughout the process since you were her employee representative. The committee discussed this issue at length. At the completion of the discussion, everyone agreed not to discuss or share information with anyone unless so directed by the committee. The purpose was to avoid tainting or otherwise compromising the grievance process.

On February 14, 1991, you submitted a letter to Denny O'Malley which contained confidential information related specifically to the grievance committee and the grievance process. The letter indicated distribution to the following individuals: Chairman of the Craig Hospital Board of Directors, Scott Manley, Kevin McVeigh, Gale Whiteneck, Carol Dannen, Rebecca Pruett, Sue Briggs, Ruby Gardner, Betty Vielhauer, Diane Reinhard, Peggy Allison, Lois Schaetzle, Phyllis Levinson, Ann Herron, Maureen Armstrong and your personnel file.

The content of the letter and the distribution to the various individuals were in direct violation of the agreement by all members of the committee for maintaining confidentiality throughout the process. At the time I suspended you, I asked you the intent of the letter and why you chose to violate our agreement on confidentiality. You indicated the intent was to apologize to me for allowing me to intimidate you and you felt it was appropriate to distribute the letter since we were in the middle of the grievance process.

After reviewing all of the materials and documentation, I find that your behavior and conduct throughout the process was uncooperative and unprofessional. Linda, your actions were insubordinate and in direct violation of the agreement by all members of the committee for maintaining confidentiality.

At the conclusion of the meeting, I asked you if you had any comments regarding my findings. You indicated you disagreed with my findings and that they reflected my point of view.

Based upon my review of information received during your suspension and the additional information you provided at our meeting, I informed you of my decision to terminate your employment at Craig Hospital effective today, February 22, 1991. My reasons for termination include the following:

1. Direct violation of the agreement by all members of the committee for maintaining confidentiality.

2. Insubordination
3. Unprofessional and uncooperative behavior

During the meeting, we also discussed your filing of a grievance against me for suspending you. I further shared I was denying your request for resolution of the suspension grievance. You indicated you also planned to file a grievance against me for terminating your employment. I indicated we would deal with your suspension and termination grievances concurrently.

I indicated you would have five working days from the receipt of my letter to submit a grievance related to your suspension and termination.

[G.C. Exh. 3.]

B. Analysis and Conclusions³

1. Were Todd's activities on the Gardner grievance committee concerted and protected?

In order to prove a violation of Section 8(a)(1), the General Counsel must establish that (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was protected by the Act; and (4) the discharge or other adverse personnel action was motivated by the protected activity. *NLRB v. Oakes Machine Corp.*, 897 F.2d 84, 88 (2d Cir. 1990).

a. Concerted activities

In *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), the Board set forth the relevant rule:

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

On remand from the United States Court of Appeals for the District of Columbia Circuit,⁴ the Board further explained:

We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.⁵

See also *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984).

The record in this case shows a concern among certain employees in the nursing department that their tenure might be affected by Dannen. In June and September 1990, about a year and one-half after Dannen's employment, Todd met with O'Malley to complain about Dannen, particularly as impacting on Gardner. In September and October of the same year, employee concern, including both supervisors and employees, coalesced in two or more meetings held at Gardner's home or in the hospital cafeteria for the purpose of for-

mulating a group counterstrategy to the alleged objective of Respondent's management to reduce staff. It was in the context of this background that Todd became Gardner's representative on the grievance committee.

Thus, up to the time of her appointment to the grievance committee, the record shows that Todd was engaged in concerted activities.⁶ It is unnecessary to determine whether Todd's concerted activities continued when she voluntarily assumed committee membership, because even if they did, I find Todd's activities on the committee were not protected.⁷

b. Protected activities

In *NLRB v. Oakes Machine Corp.*, supra, 897 F.2d at 89, the court stated,

Employee action seeking to influence the identity of management hierarchy is normally unprotected activity because it lies outside the sphere of legitimate employee interest. In a narrow category of cases, however, concerted activity to protest the discharge of a supervisor (citations omitted), or to effect the discharge or replacement of a supervisor (citations omitted) may be 'protected' provided the identity of the supervisor is directly related to terms and conditions of employment.

Todd's activities on the grievance committee narrowly were aimed at rescinding Gardner's discharge. To achieve this goal, she had to discredit Dannen and possibly affect Dannen's tenure. Accordingly, I turn back to *NLRB v. Oakes Machine Corp.*, supra at 89, for further guidance in resolving what the court describes as a factual inquiry, based on the totality of the circumstances, as to whether Todd's activities regarding Gardner and Dannen are activities directly related to terms and conditions of employment. To answer this question, I am instructed by the court to examine several factors including the reasonableness of the means of protest. I begin the inquiry with Section 7 of the Act.

Section 7 of the NLRA provides that to be protected, an activity must be for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. The "mutual aid or protection" clause of Section 7 protects employees who "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

Contrary to Todd's testimony, I find that after she accepted appointment to the Gardner grievance committee, Todd affirmatively agreed to conduct herself on the committee in a certain manner, then intentionally acted contrary to that agreement. To determine whether Todd lost the protection of the Act at this point, I first look to the Board's decision in *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990). In that case, Respondent maintained a "parent communica-

⁶ *YMCA of Pikes Peak Region*, 291 NLRB 998 (1988).

⁷ As to the element of knowledge, I find that Manley was not specifically aware of the meetings hosted by Gardner. On the other hand, Manley, O'Malley, and certainly Dannen were quite aware of the group activities by Gardner, Todd and others to protest their concerns. (Witness the October 29, 1990 meeting called by Dannen.) Thus, if Todd were engaging in concerted activities when she joined the grievance committee, Respondent was aware of them. *Thomas Steel Co.*, 281 NLRB 389, 393-394 fn. 2 (1986).

³ In light of the disposition of this case, I find without discussion that deferral of this case is not appropriate under the Board's decision in *Olin Corp.*, 268 NLRB 573 (1984).

⁴ *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985).

⁵ *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*).

tions'' rule in its employee handbook or as a corporate policy barring employees from discussing terms and conditions of employment with their colleagues and with third parties. The Board stated

Under Section 7 of the Act, employees have the right to engage in activity for their "mutual aid or protection," including communicating regarding their terms and conditions of employment.³ It is well established that employees do not lose the protection of the Act if their communications are related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue⁴ as to constitute, for example, "a disparagement or vilification of the employer's product or reputation."⁵ For example, the Board has found employees' communications about their working conditions to be protected when directed to other employees.⁶ . . .

³ See *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

⁴ Cf. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

⁵ See *Sahara Datsun*, 278 NLRB 1044, 1046 (1986), enf'd. 811 F.2d 1317 (9th Cir. 1987), quoting *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enf'd. 636 F.2d 12210 (3d Cir.1980).

⁶ In addition to *Waco, Inc.*, 273 NLRB 746 (1984), cited by the judge, see also *Heck's, Inc.*, 293 NLRB No. 132, slip op. at 23 (May 18, 1989), and *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986).

General Counsel asserts that the instant case is like many others decided by the Board, [including *Kinder-Care Learning Center*], all of which held that an employer cannot prohibit employee discussion of subjects concerning working conditions (Br. 14). Many of these cases seem to involve prohibitions on discussion of wages. See, e.g., *Highland Superstores*, 301 NLRB 199 (1991), and the cases cited therein.

For me, however, the case which is most like the present case is *International Business Machines*, 265 NLRB 638 (1982). In that case the Board held that, although employee rights were adversely affected by the company's policy prohibiting employees from distributing wage data, which it had compiled and classified as confidential, that policy was not unlawful. The issue was whether the Company had substantial and legitimate business interests which supported its policy and which outweighed the employees' interests in making use of the data compiled by the company. The Board also noted that employees were not precluded by the company from discussing their own wages with each other, but only from having access to or distributing the information which the company had compiled for its own internal use. The Board concluded that the company's business justification outweighed the employees' interest in having free access to the disputed wage data.

Even more to the point is the case of *American Arbitration Assn.*, 233 NLRB 71 (1971). There, a person employed by the Respondent as a "tribunal administrator" violated Respondent's policy of confidentiality by sending a letter and questionnaire dealing with the wearing of jeans to the office as a protest of Respondent's dress code to a list of the Respondent's lawyers and arbitrators maintained in confidence by the Respondent. In affirming dismissal of the complaint, the Board noted the tone and content of the letter and attached questionnaire and found that the discharged employee had committed disloyalty to and disparagement of Respond-

ent's judgment and capacity to effectively perform its work. Cf. *W. R. Grace Co.*, 240 NLRB 813 (1979); *Bullock's*, 251 NLRB 425 (1980).⁸

In the instant case, I find that Todd violated her agreement with other members of the grievance committee regarding confidentiality by sending the February 14 letter to O'Malley which I have recited in the facts above (G.C. Exh. 4). Undoubtedly receipt of this letter by O'Malley and the other addressees did much to undermine the entire grievance process by prejudicing or perhaps intimidating potential witnesses. Moreover, the content of the letters would not reasonably be limited to the 16 employee-addressees. Many or all if the recipients would in all likelihood discuss the contents of the letter with other employees undoubtedly adding their own embellishments. I find that Respondent had a substantial and legitimate business interest in supporting its policy of confidentiality of the in-house grievance system and this policy outweighed the interests of Todd and other employees to make use of the information obtained while Todd served on the committee. I am particularly persuaded by the fact that Todd agreed to the procedure, thereby waiving any Section 7 rights Todd may have had to disseminate or discuss the internal proceedings.

Based on the above discussion, I find that Todd's actions make her unfit for further service and recommend that this case be dismissed.⁹

2. General Counsel's prima facie case

As alternative findings, if it be found on appeal that General Counsel has presented a prima facie case that Todd's discharge was motivated in part by her concerted protected activities, I find that Respondent has carried its burden to show under *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that Todd's discharge would have occurred in any event and for valid reasons. See *D & W Food Centers*, 305 NLRB 553 (1991). As support for this conclusion, I note the facts and circumstances of this case previously discussed. In addition, I note that all other persons who have previously served on Respondent's past grievance committees are either still employed by Respondent or left of their own volition. Accordingly, under this alternative finding, I would also recommend that the complaint be dismissed.

CONCLUSIONS OF LAW

1. Respondent Craig Hospital is an employer within the meaning of Section 2(2) of the Act, engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act.

⁸ The cases of *NLRB v. Knuth Bros., Inc.*, 537 F.2d 950, 955-957 (7th Cir. 1978); *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 362-366 (5th Cir. 1990); and *New River Industries v. NLRB*, 945 F.2d 1290 (4th Cir. 1991), while tending to support my conclusion herein, are cases which refused to enforce Board Orders. Since I am bound by Board precedent, I have not relied on these cases.

⁹ The fact that Respondent had no specific rule against revealing confidential material from the grievance committee does not support General Counsel's case because Manley had a right to expect Todd to keep her promise not to reveal confidential information. *Bell Federal Savings & Loan Assn.*, 214 NLRB 75 (1974).

2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰

¹⁰If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and rec-

ORDER

It is hereby ordered that the complaint be dismissed in its entirety.

ommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.